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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-507

WILFRED KEYES, et al.,

Petitioners,

vs.

SCHOOL DISTRICT NO. 1, DENVER, COLORADO, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions below are as set forth in the Appendices to the petition herein and in respondents' conditional cross petition No. 71-572.

QUESTION PRESENTED

The question stated by petitioners is not stated in terms of the findings of fact in this case. In addition, petitioners have improperly combined the issues of their two separate causes of action into one question in an attempt to

create an issue of unconstitutional deprivation as to the whole, whereas none exists as to that part of the judgment petitioners seek to have this Court review.

STATEMENT OF THE CASE

Petitioners' statement of this case distorts the actual facts as found by the district court after preliminary hearing and a lengthy trial. Petitioners make certain selective references to evidence offered by them, as the basis for their legal arguments and theories even though the district court resolved conflicts as to such evidence in favor of the respondents. Hence respondents are obliged to restate the case in terms of the findings of fact made by the trial court as gleaned from its several opinions. References are to the opinions below printed in the appendix to petitioners' petition.

INTRODUCTION

The complaint contained two separate causes of action. The first cause of action alleged *de jure* racial segregation in certain of the schools in northeast Denver and sought desegregation thereof. The district court found *de jure* racial segregation existed as to three elementary schools and one junior high school and granted the relief sought. The Court of Appeals affirmed.

The second cause of action alleged *de jure* racial segregation and a denial of equal educational opportunity in other schools in Denver and sought desegregation of all of Denver's schools. The district court found no *de jure* racial segregation but did find a denial of equal educational opportunity in 17 schools which were *de facto* segregated. The Court of Appeals affirmed the finding of no *de jure* racial segregation and concluded that there was no unconstitutional deprivation of equal educational opportunity.

The foregoing findings must be considered in light of the number of schools in the Denver system comprised of 92 elementary, 17 junior high and 9 high schools totaling 118 schools.

School District No. 1 was created by Article XX of the Constitution of Colorado in 1902. It has never maintained separate educational facilities for different races. Pupils in the Denver School System are assigned to schools on the basis of their residence. School attendance areas are established for each school based upon the so-called neighborhood school policy.

> "It is to be emphasized here that the Board has not refused to admit any student at any time because of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (67a)

FINDINGS AND CONCLUSIONS OF THE DISTRICT COURT

(a) *Demographic Characteristics of Denver's Negro Population*

Prior to 1950, the Negro population in Denver was concentrated in an area located in the north central part of Denver (4a, 47a). (See generally map, appendix). No records of the racial composition of the schools serving this area were kept. The schools located in this area were largely, but not entirely, Negro. The Negro population was relatively small and the concentration in that area had developed over a long period of time. There is no finding that any acts of the school district caused or contributed to this situation as it existed in 1950 (4a).

Beginning in 1950 the Negro population experienced a substantial growth and moved eastward very rapidly so that by 1960 the Negro population was sizable and had expanded across Colorado Boulevard into the western portion of a residential area known as Park Hill. In the 1960's the Negro migration continued rapidly eastward across the northern portion of Park Hill, changing the population of that area to substantially Negro (4a, 47a).

(b) *Construction of New Schools*

Of all the new schools built by the Denver school district since the end of World War II (Denver spent over 100 million dollars in school construction during that time), the petitioners complain of only two. The first, Barrett Elementary School, completed in 1960, was treated in their first cause of action. The district court found that it was created as a segregated school and this was affirmed by the Court of Appeals (49a). It has been desegregated.

The other school, the replacement of Manual High School in 1953, before *Brown I.*,[1] was treated in the second cause of action. The new school was built on the old building's grounds, and served exactly the same attendance area (59a). The district court affirmatively found that no racial motivation or segregative effect was present in the replacement of this school (61a, 71a). This was affirmed on appeal (149a).

(c) *Changes in School Attendance Areas*

As to the first cause of action, the district court found that four minor boundary changes (one in 1962 and three in 1964) at two Park Hill elementary schools (Stedman and Hallett) and the use of mobile units at one of them, constituted *de jure* segregation (50a). This was affirmed by the

[1] *Brown v. Board of Education*, 347 U.S. 483 (1954)

Court of Appeals (136a) and the district court has ordered desegregation. No similar findings were made as to any of the other 116 schools in the system.

In their second cause of action, petitioners claimed that boundary changes with respect to two other elementary schools (Columbine in 1952 and Boulevard in 1962) and three secondary schools (Manual High and Cole Junior High in 1956 and Morey Junior High in 1962) also contributed to Negro concentrations in those schools. But the district court found that there was no racial motivation in the changes (71a, 72a and 73a), that no racial segregation resulted (72a, 73a), and was unable to find, in the case of Morey Junior High, that the school was ever segregated (73a). The district court summarized by concluding ". . . [w]e must reject the plaintiffs' contentions that they are entitled to affirmative relief because of the above-mentioned boundary changes and elimination of optional zones. We hold that the evidence is insufficient to establish *de jure* segregation." (75a)

The findings of the district court negate the statements in petitioners' statement of the case and in their statement of the question presented that the school district created and aggravated racial segregation throughout the entire school system.

(d) *Other Claims of Segregation*

There were no findings by the district court that either the "optional zones" or "limited open enrollment" had the effect of minority-to-majority transfers or any other segregative effect. It should be noted that limited open enrollment was superseded in 1968 by "Voluntary Open Enrollment" which authorized transfers with transportation furnished by the district if the transfer had an integrative effect in both sending and receiving schools. (109a, 118a)

(e) *Findings Regarding Educational Opportunity*

As to some 17 schools located mainly in the central area of Denver and having the largest concentrations of Negro (9 schools) or Spanish surnamed (8 schools) pupils (77a, 78a), the district court found that an "equal educational opportunity" was not being provided, based on the conclusion that racial or ethnic "isolation or segregation *per se*" (84a), "regardless of cause" (86a), was a substantial factor which produced low median pupil achievement scores. However, the district court also found that other relevant factors constituting major causes of inferior achievement were "home and community environment, socioeconomic status of the family, and educational background of the parents" (84a).

ARGUMENT

I. THERE IS NO CONFLICT IN THE DECISIONS.

This case does not involve a racially segregated school system created or aggravated by the defendants. The district court found it was not. Petitioners' statements to the contrary are not correct as has been demonstrated in the statement of the case.

Racial imbalance in the Denver school system simply was not caused or brought about by any actions of the school district, except, under the findings of the district court, as to 3 of 92 elementary schools and, derivatively, one of 17 junior high schools, all of which were located in northeast Denver and were involved in the first cause of action. The district court has decreed desegregation of each of such schools and petitioners do not claim error with respect thereto (99a-121a, A3-A8 in Appendix to conditional cross petition). Petitioners themselves elected to treat the schools of northeast Denver separately in the first cause of action of the complaint and they achieved the remedy sought thereunder.

No cases have been cited holding that facts such as those found by the district court in this case constitutionally require desegregation of the *entire* district. Therefore, there can be no conflict in lower court decisions.

As to the second cause of action dealing with schools in the core area of the city, the district court expressly found that "there is no comprehensive policy" of segregating pupils by race on the part of the Denver school district (74a).

Petitioners incorrectly suggest that this case bears some resemblance to the Pontiac case (*Davis vs. School District of City of Pontiac*, 309 F.Supp. 734), where system-wide racial balancing was ordered. But in the Pontiac case the district court, after acknowledging *"that a Board of Education has no affirmative duty to eliminate segregation where it has done nothing to create it,"* (emphasis supplied) went on affirmatively to find, as a fact, that the board of education intentionally acted to create and perpetuate segregation throughout the school system and was, therefore, guilty of *de jure* segregation as to the *entire* system (309 F.Supp. 741,2). That court then concluded that the school officials had an obligation to overcome the effects of such *de jure* segregation, and ordered the desegregation of the *entire* school system. The Court of Appeals (6th Cir.) reviewed the findings of fact and concluded that "the findings of purposeful segregation by the school district" were supported by substantial evidence and affirmed (443 F.2d 573). The Pontiac case thus rested on the same principles applied in this case, although the Pontiac case differs profoundly in the facts as found by the respective district courts to the extent of the *de jure* segregation found to exist. Indeed, as to the violation and remedy, the Denver case more closely resembles another case cited by petitioners,[2] where one school within the school district was found to have been segregated

[2] *Taylor v. Board of Education of New Rochelle*, 294 F.2d 36 (2d cir), cert. den., 368 U.S. 940 (1961)

by school authorities and where the remedy was to desegregate that school.

Nor do the district court's findings as to assignment of Negro teachers help petitioners. The only specific findings of disproportionate assignment of Negro teachers were with respect to two of the four schools found to be *de jure* segregated, namely, Barrett with 52.6% Negro (21a) and Smiley with 23 Negro teachers out of 98 (Def. Exh. S, 31a). This does not constitute segregation of faculty and staff in the Denver system.

To accept petitioners' contentions, this Court would have to extend the district court's findings of *de jure* segregation far beyond the four schools found to be so affected. Thus, petitioners attack the district court's findings that there was no *de jure* segregative action by the school district with respect to five other schools in the north central part of the city (71a-72a), findings which were sustained by the Court of Appeals (148a-149a). Petitioners do not assert that such findings of the district court were clearly erroneous, or that the Court of Appeals erred in sustaining them. Nevertheless, petitioners complain that the district court "excused segregatory acts" on the grounds of remoteness, intervening causes, and lack of intent (Petition pp. 18,19). The district court did not "excuse" any acts of the district, but found no acts constituting *de jure* segregation as to such schools (67a). Such racial imbalance as existed was found by the district court to have resulted from housing patterns (71a). There was no finding that such housing patterns resulted from any public or private discrimination.

Petitioners have not demonstrated a conflict in the decisions of the lower courts on facts such as found by the district court and affirmed by the Court of Appeals. Futher, the decision of the Court of Appeals is consistent with the

recent pronouncements of this Court.[3] Therefore, petitioners have failed to present a ground for review by this Court on the basis of conflict.

II. THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT FEDERAL COURTS HAVE NO POWER TO REMEDY A SITUATION NOT CAUSED BY STATE ACTION.

In their reason numbered II, petitioners contend that the Court of Appeals erred in reversing the trial court's ruling that the Constitution is violated by a combination of comparatively low median achievement test scores and racial imbalance in 17 of Denver's 118 schools even though it had expressly found that such conditions were not caused by state action.

Alleged error is not a sufficient basis to grant certiorari under Rule 19.1(b) of the rules of this Court and the petition should be denied for this reason alone.

In any event, the decision of the Court of Appeals on this question is correct and in accord with the decisions of this Court.

It is clear that the district court relied on so-called *de facto* segregation as the major factor contributing to "unequal educational opportunity".[4]

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[3] "Absent a constitutional violation there would be no basis for judicially ordering assignment of pupils on a racial basis." *Swann vs. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 27

[4] Throughout the trial of this case and its appeals, petitioners and the district court have used the terms "segregation" and "equal educational opportunity" generally and without defining them. Segregation implies deliberate state action setting persons apart from each other on the basis of race unless modified by the term *"de facto"* which indicates the absence of state action. The term "equal educational opportunity" was employed by this Court in *Brown* and in the context of that case, this Court said at 347 U.S. 483, 492:

> "In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity

The district court rejected plaintiffs' contention that the neighborhood school system is unconstitutional if it results in segregation in fact (74a). Yet it concluded that segregation, regardless of its cause, is a major factor in producing unequal educational opportunity and hence is unconstitutional (86a-87a).

This circular reasoning was met squarely by the Court of Appeals:

> "Preliminarily it is necessary to determine whether a school which is found to be constitutionally maintained as a neighborhood school might violate the Fourteenth Amendment by otherwise providing an unequal educational opportunity. The district court concluded that whereas the Constitution allows separate facilities for races when their existence is not state imposed, the Fourteenth Amendment will not tolerate inequality within those schools. Although the concept is developed through a series of analogized equal protection cases, e.g., Griffin v. Illinois, 351 U.S. 12 (1956); Douglas v. California, 372 U.S. 353 (1963), it would appear that this is but a restatement of what Brown v. Board of Education, 347 U.S. 483, 493 (1954) said years ago: 'Such an opportunity [of education], where the state has undertaken to provide it, is a right which

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of an education. Such an opportunity where the state has undertaken to provide it, is a right which must be made available to all on equal terms."

Thus it appears clear that the term "equal educational opportunity" as used in *Brown* means that no child should be denied access to the public schools solely on the basis of his race. In other words the opportunity to get an education must be made available by states to all equally without regard to race. Respondents are not aware of any decision of this Court extending the meaning of that term. Yet petitioners employ the term as though it means equal educational result.

must be made available to all on equal terms.'" (142a)

* * *

"The trial court's opinion, 313 F.Supp. at 81, 82, 83, leaves little doubt that the finding of unequal educational opportunity in the designated schools pivots on the conclusion that segregated schools, whatever the cause, per se produce lower achievement and an inferior educational opportunity." (143a)

The Court of Appeals quite correctly observed that federal courts have no power to resolve educational difficulties arising from circumstances outside the ambit of state action and held that:

"Before the power of the federal courts may be invoked, in this kind of case, a constitutional deprivation must be shown. Brown v. Board of Education, 347 U.S. 483, 493-95 (1954) held that when a state segregates children in public schools solely on the basis of race, the Fourteenth Amendment rights of segregated children are violated. We never construed Brown to prohibit racially imbalanced schools provided they are established and maintained on racially neutral criteria, and neither have other circuits considering the issue. Deal v. Cincinnati Board of Education, 369 F.2d 55 (6th Cir. 1966); 419 F.2d 1387 (1969); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965); Bell v. School City of Gary, Indiana, 324 F.2d 209 (7th Cir. 1963)." (145a-146a)

The Sixth Circuit had occasion recently to consider whether the law has been changed by the decisions of this Court[5] since Brown:

[5] *Deal v. Cincinnati Board of Education*, 419 F.2d 1387, (6th Cir. 1969), cert. den. ____ U.S. ____ (1971)

"Appellants petitioned the Supreme Court for certiorari in the first appeal and it was denied. Certiorari was also denied in *Downs* and *Bell, supra*. The denial of certiorari in the present case ought to constitute our opinion in the first appeal as the law of the case, but appellants contend that the law has been changed by the recent decisions of the Supreme Court in *Green* v. *County School Bd. of New Kent County*, 391 U.S. 430 (1968); *Raney* v. *Bd. of Educ. of Gould School District*, 391 U.S. 443 (1968); *Monroe* v. *Bd. of Comm'rs. of the City of Jackson*, 391 U.S. 450 (1968).

"In our opinion, these three decisions did not change any law applicable to our case and appellants' reliance on them is misplaced. The gist of the holdings in these cases was that in desegregating a dual school system, a plan utilizing 'freedom of choice' or a variant 'free transfer' is not an end in itself and would be discarded where it did not bring about the desired result.

"On the other hand, our case involves the operation of a long-established unitary non-racial school system—just schools where Negro as well as white children may attend in the district of their residence. There is not an *iota* of evidence in this record where any of the plaintiffs or any of the class which they represent was denied admission to a school in the district of his residence."

This is precisely the finding of fact by the district court in the case at bar:

"It is to be emphasized here that the Board has not refused to admit any student at any time be-

cause of racial or ethnic origin. It simply requires everyone to go to his neighborhood school unless it is necessary to bus him to relieve overcrowding." (67a)

This Court has recently considered its *Brown* decision in *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971):

> "We granted certiorari in this case to review important issues as to the duties of school authorities and the scope of powers of federal courts under this Court's mandates to eliminate racially separate public schools established and maintained by state action. *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*).
>
> "This case and those argued with it arose in states having a long history of maintaining two sets of schools in a single school system deliberately operated to carry out a governmental policy to separate pupils in schools solely on the basis of race. That was what *Brown v. Board of Education* was all about." 402 U.S. 1, 5-6.

In defining the scope of the remedial power of federal courts in such cases, this Court stated in *Swann* that:

> ". . . [J]udicial powers may be exercised only on the basis of a constitutional violation. Remedial judicial authority does not put judges automatically in the shoes of school authorities whose powers are plenary." 402 U.S. 1 at 16.

As an example, this Court stated that school authorities might well decide that there should be racial balance in every school in a district as a matter of educational policy and pointed out that, absent a constitutional violation, such

would not be within the authority of a federal court. 402 U.S. 1 at 16.

This review of the basic principles of separation of constitutional powers is appropriate here as the district judge in his zeal to do something about educational problems that have plagued educators for many years has exceeded his authority by acting in an area where no constitutional violation exists. The Court of Appeals recognized this excess of jurisdiction and corrected it (146a).

The holding of the Court of Appeals in this case that the neighborhood school policy is constitutionally acceptable, even though it results in racially concentrated schools, provided that the plan is not used as a veil to perpetuate racial discrimination, is given support by other language in *Swann*: "All things being equal, with no history of discrimination, it might well be desirable to assign pupils to schools nearest their homes." 402 U.S. 1 at p. 28. Denver has never maintained a dual school system. Denver's neighborhood school policy was in effect long before there was any racial imbalance in its schools, (59a), and thus was never utilized as a tool to perpetuate racial segregation. In sum, Denver's neighborhood school policy was and is racially neutral (66a) and racially neutral policies of local governments do not violate the Constitution* even if they result, as in this case, in some racial imbalance.

III. THIS CASE HAS NO SIGNIFICANT NATIONAL IMPLICATIONS.

Petitioners conclude their reasons for granting certiorari by stating that on either of the grounds discussed by them, the decision of the Court of Appeals is wrong and that the case should be reviewed because of its national implications without stating what these implications might be. Certainly,

*This Court recently applied this same rule in a case involving alleged discrimination in low-rent public housing. *James v. Valtierra, et al.*, ____ U.S. ____ (1971).

the national implications of federal judicial entry into the field of determining educational policy would be significant, but as this case now stands, the Court of Appeals has corrected this excess of jurisdiction leaving the problem of operating public schools throughout the nation where the Constitution intended—in the legislative and executive branches of government and not in the judicial branch. No significant national implications resulted when this Court declined to review other similar holdings.[7]

These cases have no significant national implications largely because they turn on their own facts which are vastly different in different areas of the country and vary from district to district. No useful purpose would be served by this Court's reiterating the elementary rule of constitutional law that absent a violation of the Constitution, federal courts are powerless to deal with educational problems.

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[7]*Taylor v. Board of Education of City School District of New Rochelle*, 294 F.2d 36 (2nd Cir. 1961), *cert. den.* 368 U.S. 940 (1961); *Deal v. Cincinnati Board of Education*, 369 F.2d 55 (6th Cir. 1966), *cert. den.* 389 U.S. 847 (1967); *Deal v. Cincinnati Board of Education*, 419 F.2d 1387 (6th Cir. 1969), *cert. den.* ____ U.S. ____, 29 L.Ed. 2d 128 (1971); *Bell v. School City of Gary, Indiana*, 324 F.2d 209 (7th Cir. 1963), *cert. den.* 377 U.S. 924 (1964); *Downs v. Board of Education of Kansas City*, 336 F.2d 988 (10th Cir. 1964), *cert. den.* 380 U.S. 914 (1965); and *United States v. School District No. 151, Cook County, Illinois*, 404 F.2d 1125 (7th Cir. 1968), *cert. den.* ____ U.S. ____, 29 L.Ed. 2d 111 (1971).

CONCLUSION

For the foregoing reasons, respondents respectfully pray that the petition be denied.

Respectfully submitted,

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